IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 126 OF 2015

BETWEEN

MOHAMMED HUSSEIN MOHAMMED.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Garissa (Muchemi & Mutuku, JJ.) dated 11th September, 2014

in

***H.C.CR.A No. 154 of 2013*)**

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JUDGMENT OF THE COURT

1. The appellant has preferred this second appeal challenging the death penalty meted out to him on account of his conviction for the offence of robbery with violence. His appeal is predicated on the ground that the sentence in question is not in accordance with the recent holding of the Supreme Court in **Francis Karioko Muruatetu & another vs. R [2017] eKLR (Muruatetu case)**. According to his counsel, Mr. Dome, the sentence should be proportionate to the degree of his culpability.

2. Mr. Dome urged that in the event we find that the sentence in issue ought to be reviewed we should review the same as opposed to remitting the matter back to the High court for purposes of preserving judicial time. He also argued that in determining the suitable sentence we should take into account that the appellant has been in custody for 8 years and that he is 33 years old. To buttress that line of argument, reliance was placed in this Court's decision in ***Juma Anthony Kakai vs. R [2018] eKLR*** wherein the Court on the strength of the aforementioned Supreme Court decision substituted the death penalty initially issued against the appellant therein for the offence of robbery with violence with a sentence of 20 years imprisonment. Similarly, Ms. Maina, Senior Principal Prosecution Counsel, agreed with the position taken by the appellant.

3. A brief background of the pertinent facts will place the issue at hand in context. The appellant jointly with two co-accused were charged in the Chief Magistrate's court at Garissa with two counts of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***, one count of arson contrary to ***Section 332(b)*** of the ***Penal Code*** and one count of taking part in a riot contrary to ***Section 80*** of the ***Penal Code***. Apparently, the said charges arose as a result of disagreements between two factions of *matatu* operators, one from Garissa and the other from Madogo. The dispute escalated into a riot on 11th July, 2017 wherein matatu operators at Madogo blocked the Nairobi/Garissa Highway with rocks hindering any movement in and out of Madogo.

4. As a result, Senior Superintendant of Police, Gabriel Kuua Oktoi (PW2) who was the OCPD of Bura Tana North District at the time, was directed by his superior, the OCS of Madogo, to look into the issue. Gabriel proceeded to Madogo in the company of his driver, PC Siphan Ephrahim Akello (PW1) and three other police officers. On their way they encountered groups of people who were bent on causing havoc but fortunately they managed to disperse them. Upon arrival at Madogo, Gabriel talked to the youths who had barricaded the highway and he managed to quell their anger with the promise that a crisis meeting would be held the following day to discuss the dispute between the two groups. Thereafter, the youths removed the rocks from the road and Gabriel together with the officers who had accompanied him supervised the flow of traffic at the Nairobi/Garissa Highway.

5. Nonetheless, that was not the end of that matter because the following day tension between the two groups rose once again due to something that was done by matatu operators in Garissa. Yet again this state of affairs was brought to the attention of Gabriel who rushed to

Madogo and implored the youth to remain calm until the crisis meeting which was scheduled for that very day in Garissa had taken place. Afterwards, Gabriel made his way to the meeting but before any concrete solution could be reached the youth in attendance became rowdy and began pelting rocks at the police and other government officials. Every effort by the police and the elders present to control the situation came to a naught. Eventually, everyone ran for their dear lives.

6. Nevertheless, Gabriel and PC Siphan found themselves in the thick of the frenzy. Gabriel had managed to get into the vehicle being driven by PC Siphan, a land rover registration number GK AO58V. However, before they could drive off the vehicle's windscreen was shattered by a rock and glass fragments entered into PC Siphan's eyes causing him to veer off the road and onto the sand. The vehicle got stuck in the sand giving the youth an opportunity to direct their wrath on Gabriel and PC Siphan. As per PC Siphan, the youth severely assaulted him and only spared his life when a woman intervened. In the process his AK 47 rifle serial number 793861 with 6 rounds of ammunition was stolen. As for Gabriel he was stabbed in the back and beaten to the point of losing consciousness. His Ceska pistol with 15 rounds of ammunition, cash and other personal items were also stolen. As if that was not enough the police vehicle was set ablaze.

7. Later in the day the appellant and his co-accused were arrested in connection with the incident and charged as herein above stated. Despite denying the charges against them the trial court still found them culpable of all the offences. In sentencing them the trial magistrate, honourable Ndungu H.N expressed:

> ***"SENTENCE***
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> ***I note the accused are 1st offenders. Following the conviction for the offences of robbery with violence my hands are tied. I have no discretion to exercise in sentencing due to the mandatory provisions of the law. Count 1 each accused is sentenced to death. Sentences in all other counts held in abeyance given the principle that a man can only die once and also because sentencing in the 3rd and 4th counts would be irrelevant in view of the sentence of death in Count 1."*** *[Emphasis added]*

8. Aggrieved with their conviction and the resulting sentences the appellant and his co-accused filed an appeal in the High court. The learned Judges (**Muchemi & Mutuku, JJ**.) re-evaluated the evidence on record and found that there was no evidence connecting the appellant's co-accused to any of the offences hence they were acquitted. Likewise, the learned Judges found there was no evidence linking the appellant to the first count of robbery with violence and the offence of arson. Be that as it may, the learned Judges were satisfied that second count of robbery with violence and the offence of taking part in a riot against the appellant had been established by the prosecution to the required standard.

9. The evidence which connected the appellant to the second count of robbery with violence and taking part in the riot was that a couple of hours after the incident he surrendered an AK 47 rifle to Hussein Dado (PW5), a village elder. It turned out that the serial number on the rifle he turned over matched with the serial number of the rifle stolen from PC Siphan. It is on the basis of the recovery of the stolen firearm in the appellant's possession that the High court deemed that he had not only taken part in the robbery but had also participated in the riot. With regard to his sentence the learned Judges stated:

> ***"We hereby uphold the conviction in respect of count 2*** **(robbery with violence)** ***and sentence him to death as by law established. We further sentence the 2nd appellant to 6 months imprisonment in respect of count of 4 (*****taking part in a riot).*** ***The sentence of 6 months shall be held in abeyance."***

10. The appellant's issue with the sentence in question is that the two courts below sentenced him without giving heed to mitigating circumstances or exercising their judicial discretion to asses and issue an appropriate sentence commensurate to his culpability. All the two courts did was to state that they were bound by the prescribed mandatory death sentence under ***Section 296(2)*** of the ***Penal Code.***

11. We have considered submissions by counsel and the law. The principles upon which an appellate Court will review or alter a sentence are settled. It must be demonstrated that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied; or that the sentence is illegal or unlawful. See ***Kenneth Kimani Kamunyu vs. R [2006] eKLR***.

12. The essence of the Supreme Court's holding in the **Muruatetu case** is that the principle of fair hearing extends to the sentencing stage wherein mitigation as an important congruent element of fair hearing comes into play. Mitigation is what enables the court to assess and apply its mind to the surrounding circumstances of each case for the sole purpose of meting out an appropriate penalty. The centrality and importance of mitigation in our criminal legal system is embraced under ***Sections 216*** and ***329*** of the ***Criminal Procedure Code*** which require a sentencing court to hear and take into account mitigating factors before sentencing a convicted person.

13. As such, the Supreme Court declared ***Section 204*** of the ***Penal Code*** unconstitutional for the reason that the prescribed mandatory death sentence for the offence of murder denied and/or deprived a convicted person unlike other offences, the right to have mitigating circumstances taken into account by the sentencing court. In addition, the Court was of the view that the provision impeded on the sentencing court's judicial discretion of assessing the appropriate sentence in each case. In its own words the Supreme Court held:

> ***"To our minds, what Section 204 the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decisions. Try as we might, we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence."***

14. The Court went on to state:

If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.

…

Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law."

15. Although the Supreme Court's holding focused on ***Section 204*** of the ***Penal Code*** the same applies in equal force to all capital offences where there is a prescribed mandatory death sentence such as in this case.

16. Consequently, in determining whether to interfere with the death penalty we are inclined to bear in mind the following guidelines though not exhaustive, with respect to mitigating factors as set out in the **Muruatetu case**:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender- based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

17. Based on the forgoing we are inclined to interfere with the death sentence meted out in respect of the offence of robbery with violence and substitute the same with a sentence of 20 years imprisonment which we deem as commensurate to the circumstances of the case and the appellant's culpability. Further, we see no reason to interfere with the sentence of 6 months imprisonment for the offence of taking part in a riot. Both sentences shall run concurrently from the date of the appellant's conviction at the trial court.

Dated and delivered at Nairobi this 8th day of February, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR